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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 1188

JAIME J. MERINO, *Petitioner,*

v.

UNITED STATES MARSHAL, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above entitled case entered on December 14, 1963. A petition for rehearing was denied by the same Court on January 21, 1964.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 326 F. 2d 5. The order denying the petition for rehearing is reported at 326 F. 2d 5. Prior appeals in the same matter, captioned *Merino* v. *Hocke, United States Commissioner*, are reported at 289 F. 2d 636 and 324 F. 2d 687.

JURISDICTION

The judgment of the Court of Appeals was entered on December 14, 1963. The petition for rehearing was denied on January 21, 1964. By order of this Court on March 27, 1964 the time for filing the petition was extended to and including May 19, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Whether petitioner was deprived of the fair hearing to which he was entitled under 18 U.S.C. § 3184 and the Fifth Amendment by the ruling of the United States Commissioner, which denied him authorization to take depositions in Mexico which were essential to the presentation of his case?

Whether the District Court committed prejudicial error when it refused to review the evidence for any purpose other than ascertaining whether there was any evidence to sustain the Commissioner's finding that there was probable cause to believe that petitioner was guilty.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional and statutory provisions involved are the Fifth Amendment to the Constitution of the United States, 18 U.S.C. §§ 3184 and 3190. They are printed in Appendix A.

STATEMENT

On February 1 and April 12, 1960, an extradition complaint, and an amended complaint were filed before a United States Commissioner in the Southern Dis-

trict of California (R. 2 and 5). The Republic of Mexico sought to extradite petitioner pursuant to the Treaty of Extradition between the United States of America and the Republic of Mexico of February 22, 1899 [31 Stat. 1818]. The amended complaint alleged that petitioner had sought asylum in the United States, was in the United States, and had been charged with having committed in Mexico the crimes of falsification of official acts of the government on public authority, the uttering and fraudulent use of the same, and the embezzlement of public funds by a public officer while employed by Petroleos Mexicanos, an agency of the Government of Mexico in the capacity of Superintendent of a District during 1957 and 1958. The theory advanced by the United States on behalf of the demanding country was that petitioner acting in his capacity as a Superintendent diverted funds from Petroleos Mexicanos by falsifying contracts for construction. Prior to the commencement of the hearing before the United States Commissioner, petitioner filed a timely Notice of Motion and a Motion to Take Depositions (R. 11-12) supported by affidavit (Appendix C). The affidavit specifically stated the names and addresses of witnesses whose testimony was sought, wherein the testimony would be material, and why it was necessary for petitioner to have the use of such depositions at his hearing. Specifically petitioner contended that statements and testimony of witnesses which would be offered by the Government had been obtained as a result of threats and promises and that a number of witnesses were in the custody of the Republic of Mexico and not available to appear in his behalf. Petitioner contended that he could not receive a fair hearing and the United States Commissioner

could not make a responsible decision without such evidence. Authority to take the depositions was denied on May 26, 1960. Applications for a writ of mandamus were denied by the District Court on July 12, 1960 and April 27, 1962. Appeals to the United States Court of Appeals from the denials of the writs were dismissed. *Merino* v. *Hocke*, 289 F. 2d 636; *Merino* v. *Hocke*, 324 F. 2d 687.

At the hearing petitioner denied the wrongdoing alleged, argued that the Statute of Limitations had run on the offenses charged, and contended that the evidence introduced against petitioner did not establish an offense falling within the Extradition Treaty. On June 12, 1961, the United States Commissioner entered an order finding petitioner extraditable. Petitioner filed a petition for Writ of Habeas Corpus on June 21, 1961 (R. 2, 6, 80). Before the District Court petitioner argued that the Court should review the evidence to determine whether there was probable cause to believe that petitioner was guilty. The Court refused to determine whether there was probable cause and restricted its review to a determination of "whether there is any evidence warranting the finding of probable cause." (R. 85). The United States District Court entered an order dismissing the Writ of Habeas Corpus on April 3, 1963 (R. 85). The Court of Appeals affirmed the order.

REASONS FOR GRANTING THE WRIT

1. Petitioner was denied authorization to take any depositions in Mexico. These depositions were necessary for a fair hearing because in the absence of these depositions it was not possible for the United States Commissioner to assess the credibility of the witnesses

whose testimony formed the basis of the demand that petitioner be extradicted. To prevail in the extradition hearing it was necessary for petitioner to establish to the satisfaction of the Commissioner that the Government's evidence was insufficient to sustain the charge, that the Government's evidence was so unworthy of belief that it did not establish probable cause for believing that petitioner was guilty. To deny the right to take depositions in Mexico was the equivalent of holding that petitioner would be held extraditable if the Government could present a prima facie case. The issue of the weight to be given the Government's evidence ceased to be of importance.

The Commissioner apparently based his ruling on the decision of this Court seventy-four years ago in *Orteiza y Cortes* v. *Jacobus*, 136 U.S. 330, 336-337.

Petitioner submits that this Court should re-examine its holding that an accused in an extradition proceedings may not present testimony taken by deposition outside of the United States. The right to present such testimony is implicit in the statutory requirement that an accused receive a hearing. A denial of the right, deprives petitioner of a fair hearing required by the due process clause of the Fifth Amendment.

This Court has recognized the need for clarifying the nature of the hearing required in extradition proceedings and the importance of whether a party to the proceedings should have the right to take depositions when it granted the petitions for writs of certiorari in *Aristequieta* v. *First National City Bank*, 274 F. 2d 206, 365 U.S. 840, motion to vacate judgment granted, 84 S. Ct. 144, and *Aristequieta* v. *First National City Bank*, 287 F. 2d 219, 365 U.S. 40, motion to

vacate judgment granted, 84 S. Ct. 144. The right of an accused to take depositions and to introduce them in evidence is of even greater importance than the right of the demanding country.

2. In dismissing the writ of habeas corpus, the District Court limited its review to a determination of whether there was any evidence warranting the finding by the Commissioner that there was probable cause to believe petitioner was guilty (R. 85). The District Court refused to determine itself whether there was probable cause or to inquire whether the procedure followed by the Commissioner was adequate to afford a full and fair hearing or whether the material facts were adequately developed at the hearing. A broader review was denied on the authority of this Court's decision in *Fernandez* v. *Phillips*, 268 U.S. 311.

Petitioner submits that this Court should re-examine the premises upon which its decision in the *Fernandez* case was based. The scope of review in habeas corpus proceedings has been greatly enlarged since the *Fernandez* decision. The importance of this broader scope of review of state court judgments in criminal cases was made clear by the Court during the last term in *Townsend* v. *Sain*, 372 U.S. 293. It begs the question to assert as did the Court of Appeals, that the *Townsend* decision is inapposite in the field of international extradition. Impelling reasons exist why this Court should re-examine the holding in *Fernandez* in the light of the *Townsend* decision.

This Court has recognized that extradition proceedings are criminal in nature. *Grin* v. *Shine*, 187 U.S. 181, 187; *Rice* v. *Ames*, 180 U.S. 371, 374. It has

on occasion compared an extradition hearing with a preliminary hearing before a United States Commissioner on a criminal complaint. See *Collins* v. *Loisel*, 259 U.S. 309; *Orteiza y Cortes* v. *Jacobus*, 136 U.S. 330. The analogy while valid in some respects has inherent weaknesses. A preliminary hearing in a criminal case decides nothing except whether the defendant shall be held for the Grand Jury. A determination against an accused is followed by extensive proceedings in which the accused has the benefit of extensive procedural rights. An extradition hearing, however, is the only judicial proceeding available to the defendant except for habeas corpus proceedings. Consequently, the standard utilized by the District Court in reviewing the ruling of the Commissioner is of fundamental importance if defendants in extradition proceedings are to obtain the protection of their rights before the Court.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Constitutional and Statutory Provisions Involved

CONSTITUTION OF THE UNITED STATES—AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 18, U.S.C. § 3184—CRIMINAL PROCEDURE

Fugitives From Foreign Country to United States

Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him to the Secretary of State, that a warrant may issue upon the requisi-

tion of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made. June 25, 1948, c. 645, 62 Stat. 822.

TITLE 18, U.S.C. § 3190—EXTRADITION

Evidence on Hearing

Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required. June 25, 1948, c. 645, 62 Stat. 824.

APPENDIX B

Opinion of the Court Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dec. 14, 1963

No. 18,714

JAIME J. MERINO, *Petitioner-Appellant,*

v.

UNITED STATES MARSHAL, *Respondent.*

On Appeal from the United States District Court for the Southern District of California, Central Division

Before: CHAMBERS and JERTBERG, Circuit Judges and MURRAY, District Judge.

JERTBERG, Circuit Judge:

Before us is an appeal from a judgment of the United States District Court for the Southern District of California dismissing a petition for habeas corpus filed by appellant. Said petition for writ of habeas corpus was filed in the District Court after an adverse decision by the United States Commissioner following a hearing pursuant to the provisions of 18 U.S.C. §.3184. Following such hearing the Commissioner found as a fact, "that the evidence presented is sufficient under 18 U.S.C. § 3184 to sustain the charges under the provisions of the treaty, and" concluded "that the defendant should be surrendered to the proper officials of Mexico." From such findings and conclusion the Commissioner ordered "that the defendant stand committed to the custody of the United States Marshal without bail until the surrender shall be made."

Jurisdiction of the Commissioner to hear extradition matters is based on said Commissioner's Order of Appointment dated February 28, 1959, and pursuant to the pro-

visions of Title 18 U.S.C. § 3184 and the Treaty of Extradition between the United States of America and the Republic of Mexico, ratification exchanged April 22, 1899, proclaimed April 24, 1899 [31 Stat. 1818], amended by supplemental convention effective July 11, 1926 [44 Stat. 2409], again amended by supplemental convention effective April 14, 1941 [55 Stat. 1133.]

The District Court had jurisdiction to entertain appellant's petition for writ of habeas corpus pursuant to the provisions of Title 28 U.S.C. § 2241(a). This Court has jurisdiction to entertain this appeal under the provisions of Title 28 U.S.C. § 2253.

The extradition complaint filed February 1, 1960, as amended April 12, 1960, charges in essence that appellant is duly and legally charged with having committed in Mexico the crimes of falsification of the official acts of the Government or public authority and the uttering or fraudulent use of the same; and embezzlement of public funds by a public officer or depository, while employed by Petroleos Mexicanos, an agency of the Government of Mexico, in the capacity of superintendent of the District of Poza Rica, the State of Vera Cruz, Mexico, during the years 1957 and 1958.

The amended extradition complaint further charges that the appellant has been found outside the boundaries of the said Mexico; that a warrant for the arrest of appellant cannot be served in Mexico; and that the appellant has sought asylum within the jurisdiction of the United States of America and may be found in the State of California, City of Redondo Beach; and that said appellant is not a citizen of the United States of America.

Prior to the hearing before the United States Commissioner, appellant moved the Commissioner for an order authorizing the taking of depositions of certain persons residing in Mexico. Following denial of said motion by

the Commissioner appellant applied to the United States District Court for a writ of mandamus or, in the alternative a motion for an order directing the Commissioner to make an order authorizing the taking of the depositions. The District Court denied the application and motion. Upon appeal to this Court the appeal was dismissed. *Jaime J. Merino*, Appellant v. *Theodore Hocke, United States Commissioner, United States Marshal*, Appellees, reported 289 F. 2d 636 (9th Cir. 1961).

Following the hearing by the Commissioner under the provisions of 18 U.S.C. § 3184, appellant renewed his application for a Writ and Order to the District Court. Following denial of the renewed application and motion by the District Court, appeal from such denial was taken to this Court. The appeal was dismissed by this Court in *Jaime J. Merino*, Appellant, v. *Theodore Hocke, et al.*, Appellees, No. 18271 of this Court, ... F.2d .... (9th Cir. 1963).

The Treaty of Extradition between the United States of America and the Republic of Mexico, as amended, in pertinent part provides as follows:

ARTICLE II of the Treaty of February 22, 1899 [31 Stat. 1818] provides in pertinent part:

> "Persons shall be delivered up, according to the provisions of the convention, who shall have been charged with, or convicted of, any of the following crimes or offenses:
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> "1. • • •
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> "2. • • •
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> "3. • • •
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> "4. • • •
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> "5. • • •
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> "6. • • •

"7. • • •

"8. • • •

"9. • • •

"10. The forgery, or falsification of the official acts of the Government or public authority, including courts of justice, or the utterance or fraudulent use of any of the same.

"11. • • •

"12. • • •

"13. Embezzlement or criminal malversation of public funds committed within the jurisdiction of either party by public officers or depositaries.

"14. • • •

"15. • • •"

ARTICLE III of the same Treaty provides in pertinent part as follows:

"Extradition shall not take place in any of the following cases:

"1. When the evidence of criminality presented by the demanding party would not justify, according to the laws of the place where the fugitive or person so charged will be found, his or her apprehension and commitment for trial, if the crime or offense had been there committed.

"2. When the crime or offense charged shall be of a purely political character.

"3. When the legal proceedings or the enforcement of the penalty for the act committed by the person demanded has become barred by limitation according to the laws of the country to which the requisition is addressed."

ARTICLE VIII of the same Treaty provides in pertinent part as follows:

"Requisitions for the surrender of fugitives from justice, under this present convention, shall be made by the respective diplomatic agents of the contracting parties, or, in the event of the absence of these from the country or from its seat of government, they may be made by superior consular officers.

"If a person whose extradition is asked for shall have been convicted of a crime or offense, a copy of the sentence of the court in which he was convicted, authenticated under its seal, with attestation of the official character of the Judge by the proper executive authority, and of the latter by the minister or consul of the respective contracting party, shall accompany the requisition.

"When, however, the fugitives shall have been merely charged with a crime or offense, a similarly authenticated and attested copy of the warrant for his arrest in the country where the crime or offense is charged to have been committed, and of the depositions upon which such warrant may have been issued, must accompany the requisition as aforesaid.

"Whenever, in the schedule of crimes and offenses of article 2nd, it is provided that surrender shall depend on the fact of the crime or offense charged being punishable by imprisonment or other corporal punishment according to the laws of both contracting parties, the party making the demand for extradition shall furnish, in addition to the documents above stipulated, an authenticated copy of the law of the demanding country defining the crime or offense, and prescribing a penalty therefor.

"The formalities being fulfilled, the proper executive authority of the United States of America, or of the

United Mexican States, as the case may be, shall then cause the apprehension of the fugitive, in order that he or she may be brought before the proper judicial authority for examination. If it should then be decided that, according to the law and the evidence, the extradition is due pursuant to the terms of this convention, the fugitive may be given up according to the forms of law prescribed in such cases"

18 U.S.C. § 3184 provides:

"§ 3184. *Fugitives from foreign country to United States*

"Whenever there is a treaty or convention for extradition between the United States and any foreign government, any justice or judge of the United States, or any commissioner authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging any person found within his jurisdiction, with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government, for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

18 U.S.C. § 3190 provides:

§ 3190. *Evidence on hearing*

"Depositions, warrants, or other papers or copies thereof offered in evidence upon the hearing of any extradition case shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that the same, so offered, are authenticated in the manner required."

The hearing provided for by Section 3184 consumed approximately two weeks. On behalf of the appellee there was received in evidence, properly and legally authenticated, documents consisting of the petitions for the arrest of appellant for the offenses set forth in the amended complaint, warrants for the arrest of appellant, depositions in support of the warrants of arrest to which there were annexed many documentary exhibits, certifications as to the existence in the laws of Mexico of the offenses set forth in the amended complaint, and certifications as to the creation and the status and powers of Petroleos Mexicanos. In addition to the receipt in evidence of all of the foregoing documents, including the depositions of Mexican citizens whose testimony relate to the facts and circumstances surrounding the commission by the appellant of the offense charged in the amended complaint, there was also received into evidence on behalf of appellee the testimony of a member of the Bar of the Republic of Mexico, and a faculty member of the Law School of the University of Mexico, who qualified as an expert on the law of Mexico. The evidence received on behalf of appellant consisted of documentary exhibits, the testimony of appellant, the testimony